EMMA JONATHAN NORTHWAY

IBLA 79-60 Decided April 4, 1980

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, rejecting in part, Native allotment application F-17749.

Set aside and remanded.

1. Alaska: Native Allotments -- Alaska: Land Grants and Selections: Generally -- Patents of Public Lands: Effect

In treating cases similar in all respects to those encountered by the court in Aguilar v. United States, 474 F. Supp. 840 (1979), the Board will conform to the District Court's directions in that case. Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for an allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements under the Native Allotment Act, BLM must notify the State of Alaska. The State, if dissatisfied, may either initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Appeals.

APPEARANCES: James Q. Mery, Esq., Alaska Legal Services, for appellant; Barbara J. Miracle, Esq., Assistant Attorney General, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Emma Jonathan Northway has appealed to this Board from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated August 24, 1978, which rejected in part her Native allotment application for parcel C, sec. 26, T. 17 N., R. 12 E., Copper River meridian, Alaska. The stated reason for rejection was the subject land was patented to the State of Alaska on January 2, 1964, Patent No. 1234509, and, therefore, is not subject to disposal under the public land laws.

The record shows that appellant claimed use and occupancy since the mid-1930's, more than 30 years prior to the State selection and patent. The State of Alaska received patent to "C" of Northway's allotment claim.

Appellant claims Native occupancy predating the issuance of the State's patent in 1964. She contends is that her prior occupancy entitles her to the lands, and she requests that the Department seek the cancellation of the patent claimed to have been erroneously issued to the State in dereliction of the Department's obligation to her. Appellant argues that the lands in question were not available for selection by the State under the provisions of the Alaska Statehood Act because her prior Native occupancy prevented the lands from being "vacant, unappropriated, and unreserved" at the time of their selection.

The State of Alaska contends that the Board should stay the appellant's appeal concerning parcel "C" and remand the case to the Fairbanks District Office for readjudication of the applications for parcels "A," "B," and "D." The State of Alaska bases its argument on the premise that the Board cannot seek cancellation of the patent with respect to parcel "C" because once land has been patented, it is no longer unappropriated land of the United States and applications covering such land should be rejected. The State of Alaska asserts that it was never served with a copy of the decision in the above-captioned case, and that BLM approved appellant's allotment application for parcels "A," "B," and "D" without noting the prior State selections, without rejecting the State's selections, and without notifying the State of its decision. The State requests that the Board overturn BLM's decision approving allotments of parcels "A," "B," and "D" and order the case file returned to the Fairbanks office for an adjudication of the allotment claims vis-a-vis the State's selections.

In 1906, Congress passed the Alaska Native Allotment Act, 34 Stat. 197, as amended, by the Act of August 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270-1-3 (1970), which allowed the Natives of Alaska to acquire title to the land occupied and used by them. United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1015 (D. Alaska 1977). The

Act authorized the Secretary "in his discretion and under rules as he may prescribe" to allot up to 160 acres of vacant, unappropriated, and unreserved land in Alaska to any qualified Alaska Native. To qualify, the Native applicant must make proof satisfactory to the Secretary of substantially continuous use and occupancy, which is at least potentially exclusive of others, over a minimum term of 5 years.

The legal precedents established by this Board in Native allotment cases where public land has been conveyed by a patent issued by the United States, came under judicial scrutiny in Aguilar, et al. v. United States, 474 F. Supp. 840 (D. Alaska 1979). Aguilar was initiated by certain Native Alaskans, on their own behalf and the behalf of all other Natives similarly situated, who asserted or could have asserted entitlement to allotments of public land pursuant to the Alaska Native Allotment Act of May 17, 1906, supra. The Alaska Natives brought an action challenging the Department of the Interior's rejection of their allotment applications without a hearing on grounds that the subject land had been conveyed to the State of Alaska. The District Court held that: (1) use and occupancy prior to State selection gave the native claimants a "preference right" under Alaska Native Allotment Act; (2) the fact that plaintiffs did not file an application for allotment until after the land was selected by the State did not eliminate the "preference right" protection given their prior use and occupancy; (3) Government's decision not to recover the land before it held a hearing to determine the facts was arbitrary and capricious; (4) if defendant had mistakenly or wrongfully conveyed land to the State of Alaska to which plaintiff had a superior claim, it was the responsibility of the defendant to recover that land.

The Court certified a class under Fed. R. Civ. P. 23(a) and (b)(2) (1976) as follows:

> All Alaska Native Allotment applicants each of whom commenced use of the land for which he or she applied prior to the filing with the Department of Interior of an application for conveyance of the same land to the State of Alaska and whose allotment application was or will be rejected, in whole or part, because the land described therein was conveyed to the State of Alaska prior to adjudication of the allotment application.

The Court then ordered, inter alia, "That the plaintiffs' cases are remanded to the Department of the Interior with instructions to adjudicate their substantive claims of entitlement pursuant to all applicable procedures."

As the District Court in Aguilar did not cancel the State's patent(s), the question arises whether this Department retains jurisdiction to implement the court's order "to adjudicate their substantive

claims of entitlement pursuant to all applicable procedures." See Germania Iron Co. v. United States, 165 U.S. 379 (1897); State of Alaska, 45 IBLA 318 (1980). Perhaps this Department should seek clarification of this question before more cases of this type arise. Nevertheless, no appeal was taken by the United States or the State of Alaska from the Court's decision in Aguilar, and it remains the law of the case in that judicial district. See Roy G. Denny, 46 IBLA 273 (1980).

Accordingly, since appellant, Emma Jonathan Northway, is apparently a member of the class as certified by the District Court, we set aside the decision of the Bureau of Land Management, Fairbanks, Alaska, District Office, and remand the case for a determination of appellant's rights to the patented land in parcel "C," consistent with the Court's ruling in Aguilar, supra. BLM is instructed to advise the State of Alaska of the proceeding, and to notify any third parties that may be affected.

Should it be determined that appellant is entitled to the patented land, it will recommend to the Solicitor that he request the Attorney General to initiate suit to cancel the patent. Dorothy H. Marsh, 9 IBLA 113 (1973). 1/

With respect to parcels "A," "B," and "D," the State was not given notice of BLM's decision to grant an allotment of these parcels to Northway.

Accordingly, we hold that with respect to parcel "A," "B," and "D," that the case is hereby remanded to the BLM, which will afford the State an opportunity to initiate private contest proceedings. The State may, within the period prescribed, initiate a private contest proceeding pursuant to 43 CFR 450-1. Otherwise, upon issuance of a decision concluding BLM's adjudication, it may appeal to this Board. If it elects to initiate a private contest, an appeal to this Board may be brought by any party adversely affected by the resultant decision. If, on the other hand, the State elects to appeal directly to this Board from a dispositive decision by BLM, the State must recognize that a decision by this Board which disposes of a case is final, that no further appeal will lie in this Department, and the administrative remedy is exhausted. 43 CFR 4.21(c). Therefore, if the State elects to appeal to this Board rather than bring a private contest, the State will have no further administrative recourse if the Board affirms the action of BLM.

1/ We note that patent was issued to the State of Alaska on January 2, 1964, and that there is a 6 year limitation on "suits by the United States to vacate and annul any patent * * *." 43 U.S.C. § 1166 (1976). However, see Cramer v. United States, 261 U.S. 219 (1923).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decision appealed from is set aside and the case remanded for further proceedings in accordance herewith.

Edward W. Stuebing
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joan B. Thompson
Administrative Judge